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No. 82-1308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE WILMINGTON MEDICAL CENTER, INC., and CRAWFORD H. GREENWALT, as Chairman of the Board of Trustees, and JOSEPH A. DALLAS, as Chairman of the Board of Directors,

Petitioners

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PUERTO RICAN CIVIL RIGHTS LEAGUE, INC., OLDER AMERICANS COALITION, WILMINGTON UNITED NEIGHBORHOODS, BRANDYWINE TRINITY METHODIST CHURCH, on Behalf of Their Members and Others Similarly Situated, and RAYMOND W. BROWN, MARIA GALINDEZ, for Herself and as Parent and Guardian for Her Minor Children, Reynaldo, Galindez and Pedro Galindez, MILAGRO QUINONES, DENISE SMOKES, on Behalf of Themselves and Others Similarly Situated; and CITY OF WILMINGTON, a Municipal Corporation,

Respondents

OPPOSITION OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 9, 1983

QUESTION PRESENTED

Did the Court of Appeals err in awarding attorney's fees under 42 U.S.C. §1988 and 29 U.S.C. §794a(b) to a party whose efforts were a material factor in achieving partial relief through a binding agreement entered into by one defendant with another?

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No. 82-1308

THE WILMINGTON MEDICAL CENTER, INC., et al,

Petitioners,

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al,

Respondents.

OPPOSITION OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

Respondents, National Association for the Advancement of Colored People, et al., oppose the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals

for the Third Circuit, entered in this cause on September 20, 1982, rehearing denied, November 8, 1982.

STATEMENT OF THE CASE

The issue in this case is whether plaintiffs, respondents herein, were prevailing parties and entitled to an award of attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988 and the Rehabilitation Act of 1973, 29 U.S.C. §794a(b)(Supp. II 1978), for work which achieved some of the benefits sought in plaintiffs challenge to the proposal by the petitioner Wilmington Medical Center (WMC) to relocate many of its urban hospital facilities and services to a suburban location.[1/] Petitioner's

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1/ The plaintiffs were black, Puerto Rican, elderly and handicapped individuals and groups representing

Statement of the Case as well as that of Amici obscures the fact that plaintiffs achieved success on the merits of some of their claims. Plaintiffs sought attorneys fees only for their work in obtaining concrete benefits, i.e., for work which led to and contributed to findings by HEW that the petitioner's original relocation plan would constitute a prima facie violation of Title VI and Section 504 and to the agreement entered into between WMC and HEW to remedy those violations.

1/ cont'd from previous page

persons similarly situated in Wilmington, Delaware. The original defendants included the Wilmington Medical Center (WMC), the Secretary of the Department of Health, Education and Welfare (HEW), the Director of the (Delaware) Bureau of Comprehensive Health Planning (BCHP), and the Chairman of the Health Planning Council, Inc. (HPC). Fees were awarded only against WMC, which is the sole petitioner here.

A. History of the Case.

1. Initial Stages Before HEW Investigation.

This action was filed on September 10, 1976 charging, inter alia, that WMC had violated its obligations to plaintiffs under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, by planning to relocate the major portion of its hospital facilities outside the city. 2/

2/ Plan Omega involved closing two of WMC's facilities located in downtown Wilmington, renovating one of the downtown facilities, the Delaware Division, reducing its beds from 450 to 250 and building a new 780-bed hospital on a site south of Wilmington, known as the Southwest Division. Services also would be allocated between the two hospitals resulting in moving some vital services to the Southwest Division. A detailed description of the original Plan Omega is found at NAACP v. Wilmington Medical Center, 491 F.Supp. 290 at 298-99 (D.Del. 1980), aff'd, 657 F.2d 1322 (1981).

The complaint alleged that the relocation plan violated Title VI and Section 504 in these respects: (1) access to health care for minorities and handicapped residing in the city would be inadequate; (2) quality of care at the inner-city Delaware Division would be inferior to that provided at the suburban Southwest Division; and (3) the Delaware Division would be racially identifiable. Plaintiffs sought a declaratory judgment that "the removal and relocation of the Wilmington Medical Center facilities, as described in Plan Omega," (emphasis added) would violate Title VI and Section 504 and a permanent injunction which, inter alia, "prohibits the Wilmington Medical Center from relocating and diminishing

the services currently offered by its medical facilities in Wilmington."

During hearings on motions by governmental defendants for summary judgment, the District Court raised with counsel whether HEW should be ordered to conduct a civil rights investigation. HEW subsequently decided to proceed with such an investigation and advised the Court that the agency would treat plaintiffs' civil complaint as if it had been filed administratively and would undertake its first civil rights investigation of a hospital site selection. On January 19, 1977, the Court denied the motions to dismiss, and ordered HEW to conduct a civil rights investigation in accordance with its Title VI regulations. NAACP v. Wilmington Medical Center, Inc., 426 F.Supp. 919 (D. Del. 1977).

2. The HEW Investigation.

The HEW investigation based on plaintiffs' complaint began on January 19, 1977 and continued through early July. HEW relied upon reports and written materials submitted by plaintiffs. Plaintiffs suggested the data collection design employed by HEW and critiqued and reviewed the methodology of the investigation. Plaintiffs also met continually with members of the HEW investigative team. NAACP v. Wilmington Medical Center, 453 F.Supp. 280 at 291 (D. Del. 1978).

On July 5, 1977, the Regional Director of the Office for Civil Rights (OCR) responsible for Delaware issued a Letter of Findings which concluded that Plan Omega, as proposed, would constitute a prima facie violation of Title VI and Section 504 "since the

proposed relocation (1) would have a disproportionate impact on the basis of race and handicap and (2) that degree of impact is not justified by substantial considerations unrelated to race, national origin or handicap." The Letter of Findings specifically found civil rights violations with regard to three issues raised in plaintiffs' complaint: (1) access to health care including inadequate transportation to be provided under Plan Omega, (2) quality of care and (3) segregation on the basis of race between the two facilities. The Letter also indicated that the violations could be eliminated if WMC agreed to a number of changes in Plan Omega.

3. Negotiations and the Supplemental Agreement.

After the Letter of Findings was issued, negotiations began between HEW and WMC which resulted in the Supplemental Agreement of November 1, 1977.[3/] The Supplemental Agreement also addressed all three of the major issues raised by the complaint -- access, quality of care and racial identifiability -- and provided specific and concrete remedies that HEW believed would prevent a Title VI and Section 504 violation from

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3/ Plaintiffs played a significant role throughout these negotiations even though they were not a formal party to the negotiations. Plaintiffs raised issues with HEW counsel which were explored by HEW and which affected the Agreement. NAACP v. Wilmington Medical Center, Inc., 453 F.Supp. 330 at 335 (D. Del. 1978) and 453 F.Supp. 280 supra at 304, 307.

occurring in the future.[4/] For example, to remedy access difficulties the Agreement contained detailed provisions on transportation, publicity of the transportation system, instructions for emergency transportation and an Ombudsman to act upon complaints regarding access to services. The Agreement bound WMC to comply with its requirements: "a violation of any of the requirements hereof will constitute a breach of the Health Insurance Benefits Agreement hereinabove referred to, a prima facie violation of said Title VI and/or said Section 504, and will further constitute grounds for

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4/ A detailed discussion of the Supplemental Agreement is found at 491 F.Supp. at 299 and 657 F.2d at 1325.

the termination of any other federal assistance." 491 F.Supp. at 300. See also 453 F.Supp. at 292 ("That agreement constitutes a binding and specifically enforceable contract ... the terms of which obligate WMC to modify and supplement those particular features of Plan Omega which HEW believes will otherwise have a discriminatory effect.")

4. Subsequent Litigation.

Petitioner's description of the litigation history (at 4-5) fails to separate the plaintiffs' challenge to the original Plan Omega and their subsequent challenge to the remedial plan. These are two distinct issues and were treated as such by plaintiffs. For example, the Second Amended Complaint treated these issues as separate causes of action and sought separate relief.

Plaintiffs prevailed on the first issue when WMC did not contest the HEW findings that the original Plan Omega violated Title VI and Section 504. Plaintiffs' challenge to the adequacy of the amended plan as represented by the Supplemental Agreement did not ultimately succeed. 491 F.Supp. 290, aff'd 657 F.2d 1322.

B. The Attorney's Fees Decisions

After the final trial on the merits, respondents sought attorney's fees for the work which they performed on their civil rights claims which led to, contributed to and resulted in the HEW Letter of Findings of July 5, 1977 and the Supplemental Agreement between WMC and HEW of November 1, 1977. Plaintiffs never sought attorney's fees for

any claims which they lost on the merits.[5/]

In a decision rendered on December 21, 1981, the District Court denied attorney's fees. In reversing the District Court, the Court of Appeals found: first, respondents were prevailing parties within the meaning of 24 U.S.C. §1988 because they had achieved "some of the benefits sought" in the litigation; second, respondents' lawsuit and efforts were a material factor in bringing about a remedy to

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5/ Plaintiffs did claim attorney's fees for their success in obtaining a private right of action under Title VI and Section 504, NAACP v. Wilmington Medical Center, 599 F.2d 1247 (3d Cir. 1979), but lost the attorney's fees issue both in the District Court and the Court of Appeals.

the discriminatory effects of Plan Omega; third, respondents were prevailing parties even though the relief they achieved occurred as the result of an informal administrative proceeding within HEW.

SUMMARY OF THE ARGUMENT

Plaintiffs are prevailing parties within the meaning of 42 U.S.C. §1988 because their efforts were the catalysts for achieving substantial benefits sought in the complaint. The benefits were provided by the Supplemental Agreement entered into by WMC and HEW which modified the hospital relocation plan to address specific deficiencies raised by the plaintiffs. Thus, plaintiffs prevailed on their claim that Plan Omega as originally proposed violated Title VI and Section

504 and the Supplemental Agreement specifically addressed those violations. The decision below was fully consistent with the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, past precedents of this Court and decisions of other circuit courts of appeals.

Moreover, this case does not present issues in which there are conflicts among the circuits regarding either the standards used to determine the degree of success necessary to prevail or the test of causation. The court below applied what has now become the standard test used in all circuits to determine whether attorney's fees can be recovered when plaintiffs achieve some, but not all, of the benefits sought in their lawsuit. The Supplemental Agreement accorded plaintiffs

some relief on the merits of their claims and furthered their objectives in a significant way. In addition, plaintiffs' efforts were causally related both factually and legally to obtaining the Supplemental Agreement entered into by petitioners WMC. Petitioners did not respond "gratuitiously" when they entered into the Supplemental Agreement with HEW nor was plaintiffs' lawsuit "frivolous, unreasonable or groundless."

REASONS FOR DENYING THE WRIT

Petitioners fail to demonstrate the existence of sufficient grounds for granting a writ of certiorari in this case.

1. The Decision Below that Respondents were a "Prevailing Party" is Fully Consistent with the Decisions of this Court and the Legislative History of the Attorney's Fees Awards Act of 1976.

Contrary to the petitioners' contention, the decision of the Court of Appeals in this case does not ignore the principle that a party must "prevail" in order to receive an award of attorney's fees under 42 U.S.C. §1988. See, e.g., Hanrahan v. Hampton, 446 U.S. 754 (1980).[6/] Plaintiffs prevailed on

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6/ Petitioners' reliance on Hanrahan v. Hampton is misplaced. There this Court denied attorney's fees for work done in obtaining favorable interlocutory rulings from the Court of Appeals (involving the lower court's directed verdicts) because the plaintiffs had not yet prevailed on the merits of their claims. In this case, plaintiffs did prevail on

their claim that Plan Omega as originally proposed violated Title VI and Section 504 when petitioners WMC entered into the Supplemental Agreement which substantially modified the relocation plan in order to address specific deficiencies raised by the plaintiffs. The Agreement provided detailed remedies to the violations of Title VI and Section 504 which HEW found.[7/]

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on their claim that the original Plan Omega violated Title VI and Section 504 and plaintiffs did obtain relief through the Supplemental Agreement.

This case does not raise the question of whether a party who does not prevail can recover attorney's fees for work done which furthers a public purpose or under statutes permitting attorney's fees "where appropriate." See Sierra Club v. Gorush, 672 F.2d 33 (D.C.Cir. 1982), cert. granted, 103 S.Ct. 254 (1982).

7/ For a detailed discussion of the provisions of the Supplemental Agreement that responded to the discriminatory consequences which HEW found in the original Plan Omega, see the lower

Petitioners disregard the substantive relief plaintiffs obtained and contend (in Parts I and II of their Petition) the lower court has created a conflict among the circuits, by incorrectly deeming plaintiffs to be prevailing parties. Petitioners and Amici mischaracterize the issue -- which is whether a party can recover attorney's fees for its success in obtaining relief through an agreement entered into by an adverse party. This case does not involve a party seeking fees for claims which it lost on the merits. Plaintiffs did vindicate their rights, did obtain concrete benefits and did obtain relief sought in their

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7/ cont'd from previous page

court opinions at 453 F.Supp. 310-327 and 491 F.Supp. 324-334.

complaint. Plaintiffs seek attorney's fees only for the claims and relief on which they were successful. No judgment was entered against plaintiffs on their claim that the original Plan Omega was in violation of Title VI and Section 504.

Moreover, the Court of Appeals did not hold that losing parties in a civil rights case can obtain attorney's fees for a losing claim. What the lower court held was that a plaintiff can recover attorney's fees for its legal work in achieving benefits sought in the complaint if it was the catalyst which played a material factor in obtaining the relief accorded in an agreement binding the adverse party.

The Court of Appeals decision was fully consistent with legislative history, past precedents of this court

and decisions of other circuits.[8/] A plaintiff must prevail on the merits of at least some of his claims. Hanrahan v. Hampton, supra at 758. However, a plaintiff need not prevail on all issues in order to be considered the "prevailing party." Instead, a plaintiff need only prevail "on an important matter in the course of litigation, even when he ultimately does not prevail on all issues."

8/ Many cases cited by petitioner do not support the proposition for which they are used. For example, Reed v. Rhodes, 691 F.2d 266 (6th Cir. 1982) involved an application by a special master for his master fees in a school desegregation case. This was not an attorney's fees case. Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) denied fees based on the class issues because plaintiffs could not show that Safeway's changes in its employment practices had anything to do with plaintiff's lawsuit. The Court in Taylor had determined that the case should not proceed as a class action.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, reprinted in 1976, U.S. Code Cong. & Ad. News, 5908, 5912. See Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). See also, Robinson v. Kimbrough, 652 F.2d 458 at 462 (5th Cir. 1981); Bonnes v. Long, 599 F.2d 1316, 1318 (4th Cir. 1979), later appeal, 651 F.2d 214 (4th Cir. 1981), cert. denied, 103 S.Ct. 1476 (1982); Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), cert. denied, 450 U.S. 1012 (1981); Chicano Police Officers Association v. Stover, 624 F.2d 127 (10th Cir. 1980); Northcross v. Board of Education of Memphis, 611 F.2d 628 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979), cert. denied, 448 U.S. 906 (1980).

Moreover, the fact that the benefits achieved by the plaintiffs were a result of a settlement between HEW and WMC and not as a result of a formal administrative determination after a compliance hearing or a trial on the merits does not alter the availability of attorney's fees. See Maher v. Gagne, 448 U.S. 122 (1980). See also, S. Rep. No. 94-1011, supra at 5. Thus, when plaintiffs do vindicate rights as a consequence of their lawsuit and achieve some of the benefits sought in bringing suit, they are entitled to attorney's fees.[9/] This case does not

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9/ To preclude attorney's fees because plaintiffs did not achieve all of the relief sought either in the original complaint or in the amended complaints would deter vigorous advocacy to enforce the civil rights acts and would frustrate the purpose of the Civil Rights Attorney's Fees Award Act of 1976. ("Fee awards are essential if the

create a conflict among the circuits nor does it open "the door to recovery by plaintiffs who have not vindicated any rights against parties who have not violated any rights." Petitioners' argument that it does is hyperbole on top of misstatement.

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federal statute to which (the Attorney's Fees Award Act) applies are to be fully enforced . . . . such fee awards are ancillary and incidental to securing compliance with these laws ...."). S. Rep. No. 94-1011, supra at p. 5.

2. The Decision Below does not Conflict with the Decision of any Other Court of Appeals and does not Present an Important Issue of Federal Law.

Petitioners and Amici assert that the decision below authorized tests that were in conflict with the tests used in other circuits to determine the degree of success necessary to prevail and to determine whether plaintiffs' action caused the results obtained. There is no merit to either of these contentions. 10/

10/ Petitioners raise as the 4th question presented and argue in n.3 of the Petition that the decision below expanded Section 1988 to permit an award of attorney's fees to plaintiffs who were not "parties" to the proceeding which produced the Supplemental Agreement and that the events leading up to the Agreement were not "proceedings." Section 1988 provides that attorney's fees can be awarded "[i]n any action or proceeding to enforce ... Title VI of the Civil Rights Act of 1964 ...."

(a) Degree of Success Required.

Petitioners and Amici argue that the standard used in the Third Circuit -- that plaintiffs must achieve "some relief on the merits of their claim" -- is too

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There can be no question that the HEW investigation and negotiation with WMC were a critical part of the "action" brought by plaintiffs to secure enforcement of the Civil Rights Act. The District Court ordered HEW to undertake an administrative investigation through its Title VI compliance procedures as part of the litigation and withheld further court proceedings until the administrative proceedings were completed. In addition, the term "proceeding" as used in 42 U.S.C. §1988 and 29 U.S.C. §794a(b) would clearly encompass the HEW procedures of investigation and informal resolution that are an integral part of the HEW proceedings to enforce Title VI and Section 504. It is not necessary that plaintiffs be formal parties to an administrative proceeding in order to recover fees. It is only necessary that plaintiffs in an ongoing lawsuit be deemed to have prevailed in the proceedings. See, e.g., Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 at 767 n.15 (7th Cir. 1982). See also Thomas v. Honeybrook Mines, Inc., 428 F.2d 981

lax and inconsistent with the standards used in other circuits. This argument is made by quoting excerpts from a number of circuit cases. An examination of those cases demonstrates that petitioners have pulled phrases out of context to suggest that different tests apply. Neither petitioners nor Amici have cited a case which actually conflicts with the decision below. The argument also ignores the actual relief accorded plaintiffs.

There is virtually no difference among the circuits in the tests which are applied to determine whether plaintiffs can prevail when there is no

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(3d Cir. 1970), cert. denied, 401 U.S. 911 (1971), cited favorably in the legislative history, S.R. No. 94-1011, supra at p. 5. Cf. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

formal judicial relief.[11/] However the test is phrased, and the words of the test are used interchangeable among the circuits, it is clear that if an out-of-court agreement provides some benefit to plaintiffs and some vindication of their rights, then it is

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11/ The basic test is whether plaintiffs have achieved "some of the benefits sought" in their litigation. The "some of the benefits sought" test was first enunciated in Nadeau v. Helgemoe, supra. It has been followed or specifically referenced by virtually all other circuits when determining whether to award attorney's fees when plaintiffs achieved some but not all of their objectives in the litigation. See, e.g., Bonnes v. Long, supra at 1319; Robinson v. Kimbrough, supra at 462; Chicano Police Officers Association v. Stover, supra at 131; Northcross v. Board of Education of Memphis, supra; Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir. 1979), cert. denied, 444 U.S. 1046 (1980); Dawson v. Pastrack, 600 F.2d 70 at 78 (7th Cir. 1969). See also, Gagne v. Maher, 594 F.2d 336 at 340 (2nd Cir. 1979), aff'd 448 U.S. 122 (1980).

appropriate to award attorney's fees. Courts look to whether the plaintiffs prevailed "in a practical sense," Dawson v. Pastrack, supra at 78, or "whether the basic objectives plaintiffs seek from the lawsuit have been achieved or furthered in a significant way." Chicano Police Officers Association v. Stover, supra at 131. Courts do not look to whether plaintiffs achieved all or most of the relief sought in the lawsuit.[12/] The fact that

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12/ Some cases cited by petitioners for the proposition that the Fifth Circuit uses a standard more stringent than that of the Third Circuit involve situations in which plaintiffs did not achieve the relief they sought through out-of-court actions taken by defendants. In Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980) cert. denied, 451 U.S. 993 (1981), for example, plaintiffs had achieved through a preliminary injunction the only relief they sought in the case. In fact, the law of the Fifth Circuit is fully consistent with the decision by the Court below. See, e.g.,

plaintiffs did not achieve all of the relief sought or that they believed the Supplemental Agreement would not fully protect their rights does not change the fact that the Agreement accorded plaintiffs significant benefits and substantial relief -- that plaintiffs' objectives were "furthered in a significant way." Id.

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Jones v. Diamond, 594 F.2d 997 at 1026 (5th Cir. 1979), aff'd on rehearing en banc, 636 F.2d 1364 (5th Cir. 1981). The Ninth Circuit decision in Besig v. Dolphin Boating and Swimming Club, 683 F.2d 1271 (9th Cir. 1982) relied upon by both petitioners and Amici also does not suggest a standard more stringent than used by the Third Circuit. The issue in that case was whether attorney's fees could be recovered for actions not taken in response to the litigation and which had nothing to do with the only issue successfully resolved in the lawsuit. As pointed out previously, the Ninth Circuit precedents are consistent with the decision below. See, e.g., Williams v. Alioto, supra at 847.

In sum, this case does not raise a conflict among the circuits. The standard used below to determine whether plaintiffs achieved sufficient success to prevail is consistent with the standards used in other circuits. The relief which plaintiffs achieved benefitted plaintiffs substantially and thus entitled them to an award of attorney's fees.

(b) Causation Test.

Petitioners and Amici argue that the court below applied a causation test far more expansive than that used in other circuits. They rely principally upon the two-part causation text of Nadeau v. Helgemoe, supra at 281, and claim that the decision below is inconsistent with the second prong of Nadeau. Since the decision below is consistent with Nadeau, this case does not raise an issue in which there is a conflict among the circuits.

Nadeau required first that plaintiffs "establish that their suit was causally related to the defendants' action which improved their conditon," id. at 281.[13/]

13/ There is no serious question that plaintiffs' efforts were causally related to the Supplemental Agreement entered into by defendants. Without plaintiffs' lawsuit, there would have been neither an HEW investigation nor a Letter of Findings that Petitioner WMC violated Title VI and Section 504. Moreover, the course of the civil rights investigation as well as the factors which HEW took into account were substantially shaped by plaintiffs' actions during the hearings and motions in Court as well as during the HEW proceedings. In addition, plaintiffs' actions not only led to the Supplemental Agreement but their efforts during the negotiations affected the contents of the Agreement. In short, plaintiffs' actions played a significant role in determining whether there was an HEW investigation, how that investigation was pursued, what its ultimate findings were and what was included in the Supplemental Agreement.

Nadeau then stated that the test plaintiffs "must pass is legal as well as factual," id. In describing what was meant by "legal," the Nadeau Court looked to the standards set in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Thus the question under Nadeau is whether plaintiffs' actions were "frivolous, unreasonable, or groundless," id.[14/]

Respondents here obviously meet the second prong of the Nadeau test. Petitioners WMC did not respond "gratuitously" when they entered into

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14/ The Third Circuit has adopted the second prong of the Nadeau test in Staten v. Housing Authority of the City of Pittsburgh, 638 F.2d 559, 605 (3d Cir. 1980). See also, Ross v. Horn, supra at 1322; Sullivan v. Pennsylvania Dept. of Labor & Industry, 663 F.2d 443, at 449 (3d Cir. 1981).

the Supplemental Agreement with HEW. They did so only after being forced by plaintiffs' lawsuit and by HEW finding a prima facie violation of Title VI and Section 504. Plaintiffs' lawsuit was not "frivolous, unreasonable or groundless" nor did "plaintiffs continue to litigate after it clearly became so." Christiansburg Garment Co. v. EEOC, supra at 281.

Instead of arguing that plaintiffs' actions were "frivolous, unreasonable or groundless," petitioners argue that "the settlement or other relief must be legally caused by plaintiffs' suit." (Petition, p. 18). This is not the test of Nadeau or any of the cases cited by petitioners (pp. 18-19).[15/]

15/ In fact, petitioners test is inconsistent with those cases upon which they rely. For example, in United Handicapped Federation v. Andre,

Nor is such a test found in any other circuit case. This is a new test created by petitioners to support their position.

The decision below does not depart from the causation principles set down in cases in other circuits nor does it raise a wholesale expansion of situations in which attorneys fees can be awarded under a "catalyst" theory as

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622 F.2d 242 (8th Cir. 1980) the court stated at 346:

> It is not necessary for plaintiffs' lawsuit to be the sole cause or even the primary cause of the defendant's decision to settle. Nor is it necessary or practical for the plaintiffs to prove that their rights were in fact violated under traditional standards of analysis.

See also, Johnson v. Jago, 691 F.2d 283 at 287-86 (6th Cir. 1982); Williams v. Leatherbury, 672 F.2d 549 at 551 (5th Cir. 1982); Harrington v. DeVito, 656 F.2d 263 at 266-67 (7th Cir. 1981).

suggested by Amici.[16/] The issue below was whether the plaintiffs' efforts were a material factor in causing the HEW

16/ Amici rely upon Ward v. Dearman, 626 F.2d 489 (5th Cir. 1980) for the proposition that actions relied upon for purposes of attorney's fees must be taken by defendants, not strangers to the litigation. Whatever the merit of that proposition, it is entirely irrelevant to this case. In Ward plaintiffs sought injunctive relief under the Voting Rights Act. The case was held to be moot because no elections were held under the challenged practice. Plaintiffs then sought attorney's fees claiming victory because the challenged practice had not been continued after their lawsuit. Specifically, the plaintiffs contended that they had demanded that the relevant public official not prepare any ballot which listed candidates certified under a procedure violative of the Voting Rights Act. The Court held, however, that the public official -- who was a defendant -- did nothing either voluntarily or otherwise to comply with legal procedures. The actions which caused the cessation of the challenged practices were taken by another party who was never a defendant in the suit. There was, in short, no voluntary compliance by a defendant. Ward is totally irrelevant to this case where petitioners Wilmington Medical Center

investigation and the Supplemental Agreement. The Circuit Court found that they were. Plaintiffs' claims clearly had legal merit and they obtained significant relief. Awarding attorney's fees for their efforts was entirely appropriate.

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did act by agreeing to substantial changes in the original Plan Omega which provided plaintiffs significant relief. Ward does not, therefore, create a conflict with the decision below.

CONCLUSION

Petitioners have advanced no basis for issuance of a Writ to review the judgment of the Third Circuit. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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